Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term 1996

VIRGINIA WELLER,
Petitioner,

V.

CITATION OIL & GAS CORPORATION, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a woman whose angry boss handed her a copy of a tract threatening "corporate warfare" against "the Spirit of Jezebel" -- a spirit "attracted to the uniqueness of the female psyche" in its "hatred for male authority" -- until "Jezebel is slain" had to prove that the harassment destroyed her opportunity to succeed in the work place to make out a case of a hostile work environment under Title VII of the Civil Rights Act of 1964.

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PETITION FOR WRIT OF CERTIORARI

Virginia Weller petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit that held she had failed to prove either a hostile work-environment or intentional infliction of emotional distress to the jury.

OPINIONS BELOW

The opinion of the court of appeals appears in 84 F.3d 191 (5th Cir. June 3, 1996), 1996 W.L. 257572, and Appendix A. The judgments of both the court of appeals and the United States district court also appear in Appendix A.

STATEMENT OF JURISDICTION

This case arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. The court of appeals entered its judgment on June 3, 1996 (App. A).

This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Title 42, U.S.Code, § 2000e-2.

Employment practices.

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

a. Statement of facts.

1. Weller's job with Citation

After working for several oil-and-gas companies following her divorce, Virginia Weller joined Citation Oil & Gas Corporation in August 1990 (3 Tr. 22-23). She served as one of three employees in Citation's contract administration department (2 Tr. 20, Pl. Exh. 6, p.1).

Her boss was Ralph Hollingshead (2 Tr. 20). He had interviewed her and offered her the job (2 Tr. 13). She made almost $40,000 a year. During their interview, he told her that two women had filed sexual harassment claims against him in the past (3 Tr. 10, 11. 11-25).

Weller testified that he was pleasant on certain days but in general "a very moody person" (2 Tr. 20, l. 8). Hollingshead told Weller later that he and his wife had argued because she would not accept his status as the head of the household (3 Tr. 20-21).

Hollingshead was a devout Christian who did not attend church regularly but did attend Bible classes at 6:00 a.m. three days a week in a local restaurant (3 Tr. 83, ll. 1-10). No women attended these meetings (3 Tr. 83, ll. 11-14).

2. Sale of U-gas

As part of her job, Weller had been tracking a supply of gas held by a pipeline company known as "U" gas (meaning "unaccounted-for gas") (2 Tr. 20-21). Hollingshead did not believe Citation owned the gas (3 Tr. 64). But after Weller's inquiries, the pipeline told her the volume was not a paper volume but actual gas that Citation could sell (2 Tr. 21). The value of the gas was some $485,000 (2 Tr. 22).

She proudly reported this windfall to Hollingshead, who told her to write him a memorandum (2 Tr. 22, ll. 8-16). In the meantime, a friend told the company's senior vice-president of Weller's find (2 Tr. 22-3).

The executive vice-president called Weller to congratulate her and also left a call for Hollingshead (2 Tr. 24). Hollingshead returned the call. Weller testified:

> A. [A]fter [Hollingshead] hung up, he came into my office, and he was furious.
>
> Q. What did he say?

> A. He made a comment that Jolene [Polson, her friend] wanted to make absolutely sure that I got the credit, and that he could assure me that it would never happen again, and he was furious.

(2 Tr. 24, ll. 12-18). Hollingshead spent most of the afternoon telling her not to violate the chain of command. Weller said she apologized four or five times (3 Tr. 93-94). "[H]e was obsessive, and it was uncalled for" (Tr. 93, ll. 5-6).

Weller went to work to find a buyer for the U-gas, which took four days (2 Tr. 25). She took the prices she had negotiated to Hollingshead's office (3 Tr. 96). "[H]e had been very cold and not spoken to me and glared and still seemed very angry for those four days," she testified (2 Tr. 26, ll. 5-7).

3. "The Spirit of Jezebel"

She noticed a religious book on Hollingshead's credenza, and he gave it to her to read (2 Tr. 26-27). She testified, "[I] was glad he was speaking to me again" (2 Tr. 27, l. 2). When she returned it the next day, she commented on its "unique thought" concerning John the Baptist (2 Tr. 27). Hollingshead said "the Spirit of Jezebel" had brought about the beheading of John the Baptist (2 Tr. 27). She testified:

> And he said, "You know about the Spirit of Jezebel, don't you?" And I said, "No, I don't." And he . . . leaned back, his

> briefcase was open, and he leaned back and he picked up an article. It was 12 pages . . . and . . . it was "Discerning the Spirit of Jezebel."

(2 Tr. 27, ll. 12-21). The article was actually a copy of several chapters of a book entitled THE THREE BATTLEGROUNDS, by a Francis Frangipane (3 Tr. 71). Hollingshead gave her the excerpts to read. She testified:

> When he handed it up to me, he looked me straight in the face, and in a cold, cold voice said, "The Spirit of Jezebel is alive today." And I took the article and went back to my office.

(2 Tr. 28, ll. 8-11). She began reading the excerpts in her office and recognized Hollingshead's handwriting and underlining on it. The excerpt said:

> When we speak of Jezebel, we are identifying the source in our society of unbridled sensuality, unbridled witchcraft and hatred for male authority.

(Tr. 32, Pl. Exh. 3).

> [J]ezebel is more attracted to the uniqueness of the female psyche in its sophisticated ability to manipulate without physical force.

> This spirit operates through women who, because of insecurity, jealousy or vanity, desire to control and dominate others. Jezebel is there behind the woman who publicly humiliates her husband with her tongue, and then thereafter controls him by his fear of public embarrassment.
>
> While she uses every means of sexual perversity known in hell, immorality is not the issue; *control* is what she seeks, using the power of sexual passions for the purpose of possessing men.

(2 Tr. 32-34, Pl. Exh. 3)(emphasis in original). The article counseled "war" against the Spirit of Jezebel:

> *If you war against Jezebel when you are tempted, eventually you are going to become dangerous!* This spirit will stop attacking you once it recognizes that your aggressive counterattack is setting other people free!

(Pl. Exh. 3, p. 101)(emphasis in original).

The book turned to the Biblical story of Jehu and Jezebel, which Hollingshead had underlined in several places (Pl. Exh. 3, pp. 104-109). According to the excerpt, Jehu rode into Jezreel and called up to the eunuchs to throw Jezebel down from her upper window (2 Tr. 36). The book said:

"So they threw her down, and some of her blood was sprinkled on the wall and on the horses, and he trampled her under foot (2 Kings 9:30-33 NAS/KJ)."

There was something in Jehu's spirit that we must possess today in our war against Jezebel. While we must be compassionate toward those captured by Jezebel, Jehu has no mercy, no hope for reform, no compromise or sympathy whatsoever towards this demonic spirit! Jehu "trampled her under foot." While she lay bleeding and near death, he finished her beneath the feet of his horse.

So also with us we must have no tolerance whatsoever for this spirit. *There can be no peace, no relaxing under our "fig tree", until Jezebel is slain!*

(2 Tr. 36-37, ll. 18-4, Pl. Exh. 3 p. 109)(emphasis in original). Hollingshead had underlined the phrases "no mercy, no hope for reform, no compromise or sympathy whatsoever toward this demonic spirit." (2 Tr. 34-37).

4. Weller's request for transfer.

Weller testified that the passage "frightened" her (2 Tr. 37, l. 6). So did another passage that promoted "warfare" against Jezebel (2 Tr. 42):

> As important as it is to win the war against Jezebel in the home, we must also join together for corporate prayer and warfare.
>
> . . . .
>
> **6. Those who engage in warfare should be trained and approved by church leadership.** Every church should have a "warfare team" as well as a "backup team" which prays for those on the front lines.

(2 Tr. 41-42, ll. 20-4, Pl. Exh. 3, pp. 119-20).

At first, Weller put the article in her desk drawer, but she believed that "not only did it give permission, but it encouraged and condoned and demanded violence against women" (2 Tr. 43, ll. 14-15). She testified she thought Hollingshead had directed the article against her personally (2 Tr. 101).

> I couldn't forget the article. I started shaking. My hands were shaking. It was too intense for me.

(2 Tr. 45, ll. 11-12).

Weller said nothing but continued to work for three weeks because she was "scared" and "didn't have enough strength" (3 Tr. 21, l. 20; 3 Tr. 22, l. 11). At length, she asked Hollingshead, "Do you think I'm a Jezebel?" Hollingshead did not respond (3 Tr. 76-78).

Weller went to a lawyer to find out whether she had the right to ask for a transfer (2 Tr. 45). Then, she asked the executive vice president for a transfer without any loss of pay (2 Tr. 45). After a series of meetings and letters, the president of the company ordered her to report back to work under Hollingshead (2 Tr. 46-55, Pl. Exh. 6,7). Instead, she resigned (Pl. Exh. 8).

b. Proceedings in the trial court.

Weller filed suit against Citation and Hollingshead on October 20, 1992. She based jurisdiction on Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e (R. 6). She also sued for intentional infliction of emotional distress under state law (R. 3).

After discovery, the trial court empaneled an eight-person jury to hear the evidence, and the trial began on November 16, 1993 (R. 533). After a four-day trial, the trial judge entered judgment on the jury verdict for $310,000, which included punitive damages capped under 42 U.S.C. § 2000e (App. A).

c. Reversal by the court of appeals.

The court of appeals observed that the excerpts "contained an intense religious diatribe," and said Weller "believed that Hollingshead intended the material as a comment on her assertiveness at work." 84 F.3d at 193, App. A. All the same, relying on circuit precedent, the court of appeals reversed the judgment on the ground of insufficient evidence. The court held:

> Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the work place [*citing DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir.), *cert. denied*, __ U.S. __, 116 S.Ct. 473 (1995).] Viewing the evidence in the light most favorable to the verdict, the jury could have reasonably inferred that Hollingshead meant the article as retributive epithet -- that Hollingshead remained angry at Weller and that he was calling her a "Jezebel." . . . We therefore hold that it was unreasonable, on the evidence presented, for the jury to find that Hollingshead's conduct created a hostile work environment.

Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 194-95 (5th Cir. 1996)(App. A). Weller did not move for rehearing.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT'S RULE THAT SEX DISCRIMINATION MUST DESTROY AN EMPLOYEE'S OPPORTUNITY TO SUCCEED IN THE WORKPLACE TO CREATE A HOSTILE ENVIRONMENT IGNORES THIS COURT'S HOLDING THAT A JURY MAY LOOK TO ALL THE CIRCUMSTANCES OF THE HARASSMENT.

A. This court has held unanimously that no single consideration determines a violation of Title VII.

The court should grant certiorari in this case because the lower court has set aside a jury verdict in reliance on circuit precedent that contradicts the holding in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 371 (1993).

This court has spoken twice to give broad definition to what constitutes a hostile or abusive work-environment. Both times the court has spoken unanimously. *Harris v. Forklift Systems, Inc., supra,*; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Employees throughout the nation have come to rely on the rules expressed in these decisions.

Since the *Forklift* opinion, the courts of appeals have decided more than two dozen cases in which employees alleged a hostile work-environment. More than 150 reported Federal cases have cited the *Forklift* opinion. Most of the circuits have applied the test of a hostile

work-environment broadly, although there has been some confusion in the lower courts. In this rapidly developing jurisprudence, this court should not allow the Fifth Circuit to place an unacceptable gloss on the statute.

B. The Fifth Circuit court of appeals has added a new requirement of destruction of opportunity to this court's Forklift *holding.*

This court should grant certiorari because in reversing this jury verdict, the court of appeals added a new requirement to the holding of *Harris v. Forklift Systems.* The court of appeals held that to be actionable, Hollingshead's conduct had to destroy Weller's ability to succeed in the workplace. *Weller v. Citation Oil & Gas Corp.*, 84 F.3d at 194-95.

But the *Forklift* court held that "no single factor is required" to find an environment abusive. In fact, this court granted certiorari in the *Forklift* case to reject the Sixth Circuit's gloss that actionable conduct had to seriously affect a plaintiff's psychological well-being. 114 S.Ct. at 371.

The *Forklift* opinion nowhere mentions "destruction" of the employee's opportunity to succeed in the workplace. Justice Scalia's concurring opinion in that case concluded that the statute does not even restrict violations to unreasonable interference with performance at work, let alone destruction of the opportunity to succeed:

> One of the factors mentioned in the Court's nonexhaustive list -- whether the conduct unreasonably interferes with an employee's work performance -- would, it if were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute.

114 S.Ct. at 372.

Yet the court of appeals -- relying on its own mistaken circuit precedent -- built out of the *Forklift* opinion a brand-new test of "destruction" of the ability to succeed:

> Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's [sic] opportunity to succeed in the workplace.

84 F.3d at 194, *citing DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir.), *cert. denied*, __ U.S. __, 116 S.Ct. 473 (1995).

Not only did the court of appeals create a new test that this court has rejected, the lower court changed the meaning of this court's opinion. The court of appeals mistakenly concluded that a single incident did not amount to "severe and pervasive conduct." *Id.* n.5. The words this court actually used were "severe *or* pervasive." 114 S.Ct. at 370. A plaintiff does not have to prove both elements.

Under the *Forklift* holding, Hollingshead's diatribe against women surely qualifies as [1] a severe physical threat against Weller [2] that did in fact affect her mental well-being. The jury heard that evidence. Those are two of the circumstances this court held would justify a jury verdict. 114 S.Ct. at 371. Weller reasonably believed the tract "encouraged and condoned and demanded violence against women," herself included (2 Tr. 43, ll. 14-15). An employee should not have to wait for murder or assault to make out a case of a hostile work-environment.

Weller presented ample evidence about the conduct of her superior to go the jury under Title VII. We urge this court to grant certiorari to conform the law in the Fifth Circuit to the national rules laid down by this court.

C. The court of appeals misread the evidence when it decided that the supervisor had only used an epithet against a woman employee.

The court of appeals completely misinterpreted this jury verdict by labelling an implied threat of violence against an aggressive female employee as a mere "epithet." The jury quite properly decided otherwise.

Hollingshead was not just calling Virginia Weller a Jezebel, he was threatening her with violence. His fundamentalist tract called for "warfare" against "feminists" who are fiercely independent, intensely ambitious, and hate male authority. In this era of weapons in the workplace, no woman can ignore the threats of a boss like Hollingshead.

Hollingshead underlined the passage,

> Jehu has no mercy, no hope for reform, no compromise or sympathy whatsoever towards this demonic spirit! Jehu "trampled her under foot." While she lay bleeding and near death, he finished her beneath the feet of his horse.

Hollingshead did not just call Weller a Jezebel, he frightened her with the intensity of his hatred for feminists. That is why she shook for weeks after their encounter. If she refused to adopt a meek and submissive attitude, she reasonably feared he would decide to treat her the way Jehu treated Jezebel. Weller's friend at work, Jolene Polson, agreed in her testimony that the tract promoted violence toward women "who were thought to have the spirit of Jezebel" (3 Tr. 58, l. 4-6).

Under this court's holding in *Harris v. Forklift Systems,* Weller made out an overwhelming case of abusive work-environment for the jury.

II. THIS COURT SHOULD GRANT CERTIORARI TO FORESTALL CONFUSION AMONG THE CIRCUITS OVER THE SCOPE OF THE *FORKLIFT* OPINION.

A. Other circuits have taken a different view of the evidence required to reach a jury than the Fifth Circuit's.

Under the precedents in most other circuits, Weller's case would have no trouble reaching a jury. The lower courts are dealing constantly with cases of hostile

work-environments in which they place the requirements of proof much lower than does the Fifth Circuit.

In *Carr v. Allison Gas Turbine Div., General Motors*, 32 F.3d 1007 (7th Cir. 1994), the plaintiff was the first woman in the tinsmith shop and subjected to constant obscenities and sexual pranks. *Id.* at 1009-10. The district judge held that the harassment did not affect her because of her poor attendance.

The court of appeals reversed, with Judge Posner writing the opinion. Here is how he expressed the *Forklift* standard:

> All she need show is that her conditions of employment were adversely affected. If because she was a woman General Motors had turned down the heat at her work station in order to make her uncomfortable, that would be actionable sex discrimination, even if the discomfort inflicted was too mild to be described as "suffering."

Id. at 1011, *citing Harris v. Forklift Systems*, 114 S.Ct. at 370-71. Even in reversing a jury, Judge Posner has been "mindful of the dangers that lurk in trying to assess the impact of words without taking account of gesture, inflection" and other elements of context. *Baskerville v. Culligan International Co.*, 50 F.3d 428, 431 (7th Cir. 1995); *see Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1455-56 (7th Cir. 1994).

The Ninth Circuit has given a similar interpretation. In *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (1994), the court held that a blackjack operator subjected to a constant stream of obscene abuse by a male supervisor had proven sexual harassment:

> It is enough . . . if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position.

Id. at 1463.

The Eighth Circuit has found sexual discrimination where a doctor abused women nurses more than men, even though the abuse was not "explicitly sexual." *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264, 269 (1993). The same court has held that intimidation and hostility to women can result from conduct other than sexual advances. *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994).

The Third Circuit agreed with the Eighth Circuit's rule in a case in which a superior constantly demanded loans from a Federal EEOC investigator. Their repeated meetings provoked rumors of an affair that stifled her chances of promotion. *Spain v. Gallegos*, 26 F.3d 439, 451 (1994).

The Fourth Circuit has interpreted the *Forklift* case as posing "quintessentially a question of fact" for the jury. *Beardsley v. Webb*, 30 F.3d 524, 530 (1994). That court has even extended the *Forklift* rule to an Iranian man who

resigned his job as an engineer at a nuclear power plant after repeated insults and names such as "camel jockey," "the local terrorist," and "the Emir of Waldorf," the town in which he lived. *Amirmokri v. Baltimore Gas and Elec. Co.*, 60 F.3d 1126 (1995).

Where five women complained of inappropriate touching and remarks by an Army civilian, the Federal Circuit concluded that the women did not have to prove impairment of their job performance.

> The criterion is not what a reasonable woman employee is capable of enduring, but whether the offensive acts alter the conditions of employment.

King v. Hillen, 21 F.3d 1572, 1583 (1994). The Tenth Circuit agreed with this rule in the case of a telephone operator subjected by a male operator to constant propositions and grabbing. *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 782 (1995).

None of these courts would have reversed Weller's jury verdict on the ground that Hollingshead's threats did not destroy her ability to succeed in the workplace.

B. The Second Circuit has agreed with the Fifth Circuit that a single offense other than sexual assault will not support liability for a hostile work-environment.

The Second Circuit has taken a less expansive view of the statute than most of the other circuits. A female account manager in an environmental services company sued after her firing on the grounds that her three co-

workers had directed obscene sexual comments toward her and then raped her after a business dinner. The court of appeals held that "even a single incident of sexual assault" creates an abusive work-environment.

But for verbal abuse, the court said, "[i]n order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive." *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (1995). Of course, Hollingshead did not subject Weller to verbal abuse so much as to threats of violence if she continued to usurp male authority.

CONCLUSION

The court should grant certiorari and reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served three copies this document personally or by mail on each party to the proceeding at or before the time for filing by serving their counsel of record.

_____

ROY L. BARNES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VIRGINIA WELLER,

Plaintiff.

CIVIL ACTION
NO. H-92-3240

VS.

CITATION OIL & GAS CORP.
AND RALPH HOLLINGSHEAD,
Defendants.

JURY TRIAL DEMANDED

FINAL JUDGMENT

On the 16th day of November, 1993, came on to be heard the above entitled and numbered cause and Virginia Weller, the Plaintiff, appeared in person and by attorney

of record and announced ready for trial and Citation Oil & Gas Corp., as well as Ralph Hollingshead, the Defendants, appeared in person and by corporate representative and by attorney of record, and announced ready for trial. At the conclusion of the evidence, the Court submitted the issues in the case to the jury. The verdict of the jury against the Defendants was that:

1. Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., sexually harassed Virginia Weller;

2. Virginia Weller was constructively discharged;

3. Defendants Ralph Hollingshead and Citation Oil & Gas Corp., intentionally inflicted emotional distress upon Virginia Weller.

4. Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., engaged in the sexual harassment of Virginia Weller with malice or with reckless indifference to the federally protected rights of Virginia Weller; and

5. Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., willfully or maliciously engaged in the intentional infliction of emotional distress.

It is hereby ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Virginia Weller, have and recover damages from the Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., as follows:

1. Forty Thousand Dollars ($40,000.00) for intentionally inflicted emotional distress;

2. Twenty Thousand Dollars ($20,000.00) for past pecuniary loss.

3. Ten Thousand Dollars ($10,000.00) for past compensatory damages.

4. Prejudgment interest on the amounts described in (1), (2), and (3) from January 12, 1993, which is 180 days after Defendants received notice of Plaintiff's claim in the form of an Equal Employment Opportunity Commission charge. Prejudgment interest will be assessed at the rate of 5.02 percent (equal to post-judgment interest) and will be compounded daily as provided by state law.

5. Twenty Thousand Dollars ($20,000.00) for future pecuniary loss.

6. Eighty Thousand Dollars ($80,000.00) for punitive damages for the willful or malicious intentional infliction of emotional distress.

7. One Hundred Thousand Dollars ($100,000.00) for future pecuniary loss, future compensatory damages and punitive damages for malicious, or with reckless indifference, sexual harassment. Although the jury awarded more money for these damages, such damages are capped by statute (42 U.S.C. 2000e et seq.) at $100,000.00 for a respondent with more than 100 employees and fewer than 201 employees.

It is further Ordered that Plaintiff, Virginia Weller, recover from the Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., attorney's fees in the amount of Forty Thousand Dollars ($40,000.00) for services

rendered in preparing and presenting this case for trial. This award of attorney's fees is part of the judgment here rendered.

It is further ORDERED that the judgment here rendered shall bear interest at the rate of 5.02 percent, as provided by law, from May 17 1994 the date of judgment, until paid.

All taxable costs of Court expended or incurred in this case are adjudged against the Defendants, Ralph Hollingshead and Citation Oil & Gas, Corp. All writs and processes for the enforcement and collection of this judgment or the costs the Court may issue as necessary. All other relief not expressly granted is denied.

SIGNED on this the 17 day of May, 1994,

/s/DAVID HITTNER
Judge Presiding

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ATTORNEYS FOR DEFENDANTS, RALPH HOLLINGSHEAD AND CITATION OIL & GAS CORP.

1994

Virginia WELLER, Plaintiff-Appellee,
v.
CITATION OIL & GAS CORPORATION, and Ralph Hollingshead, Defendants-Appellants.

No. 94-20439.

United States Court of Appeals,
Fifth Circuit.
June 3, 1996

Before GARWOOD, EMILIO M. GARZA and DEMOSS, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Defendants Citation Oil & Gas Corporation ("Citation") and Ralph Hollingshead appeal a jury verdict awarding plaintiff Virginia Weller damages on her employment discrimination claims. We reverse.

I

Weller worked as a Contract Administrator in Citation's Contract and Marketing Department. The department consisted of Weller, her supervisor Ralph Hollingshead, and one other female employee. Through Weller's work monitoring natural gas stored in the El Paso Natural Gas Pipeline, Weller discovered that Citation owned a

quantity of gas which was not reflected in Citation's records. Before completing a memorandum to Hollingshead detailing her discovery, Weller informed the Executive Vice President's secretary about the gas. When the Executive Vice President phoned Hollingshead to discuss the discovered gas, Hollingshead was "caught off guard" and was unprepared to explain the status of the gas. Hollingshead's superiors reprimanded him, and in turn, Hollingshead reprimanded Weller for ignoring proper channels. According to Weller, the reprimand was unnecessarily harsh. During the next four days, Weller testified that Hollingshead seemed angry and did not speak to her.

Shortly thereafter, Hollingshead loaned Weller a religious children's book about angels. Weller testified that she was glad they were speaking again. Upon returning the book the next day, Weller told Hollingshead that the book presented a "unique thought" on the subject of angels. [FN1] Hollingshead and Weller proceeded to have a short conversation about the death of John the Baptist, and how a woman, possessed with a spirit called "Jezebel," danced when John the Baptist was beheaded. Hollingshead then gave Weller some excerpted chapters from The Three Battlegrounds, a book by Francis Frangipane. According to Weller, she felt "anger" and "coldness" coming from Hollingshead when he handed her the article. As he handed her the material, Hollingshead stated "the Spirit of Jezebel is alive today."

The excerpted material Hollingshead gave Weller contained an intense religious diatribe concerning the "Spirit of Jezebel," a "controlling" and "manipulative" spirit bent on "corrupting" society and turning it away from a fundamentalist understanding of the teachings of Christ. [FN2] According to the excerpt, the Spirit of Jezebel "is without gender," yet prefers to work through women because of the "uniqueness of the female psyche in its ability to manipulate without physical force." [FN3] The excerpt encourages its readers to "do battle" against the Spirit of Jezebel in order to maintain a fundamentalist Christian order.

Weller was deeply offended by the excerpt's contents. She believed that Hollingshead intended the material as a comment on her assertiveness at work. Three weeks later, after consulting an attorney, Weller concluded that she could no longer work with Hollingshead. She complained to Citation officials and requested a transfer. Citation officials made an inquiry into the incident and reprimanded Hollingshead but were unable to transfer Weller. Citation officials told Weller that they had spoken to Hollingshead and anticipated no further problems if she would return to work. After several weeks of negotiations, she resigned. Weller filed suit against Citation and Hollingshead, asserting claims for sexual harassment, constructive discharge, and intentional infliction of emotional distress. A jury found in her favor and awarded damages on all claims. Defendants now appeal the jury verdict. —

II

The defendants argue that Weller presented insufficient evidence to support the jury's verdict. In reviewing a case for sufficiency of the evidence, we consider all the evidence presented, not just the evidence supporting the verdict, but in the light most favorable to, and drawing all reasonable inferences in favor of, the party who obtained the verdict. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir.1969) (en banc). We will reverse only if reasonable minds exercising impartial judgment could not have arrived at the verdict. DeAngelis v. El Paso Municipal Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir.), cert. denied, ____ U.S. ____, 116 S.Ct. 473, 133 L.Ed.2d 403 (1995).

To state a claim for relief under Title VII [FN4] for gender discrimination based on a theory of a hostile work environment, a plaintiff must prove (1) that she belongs to a protected class, (2) that she was subject to unwelcome harassment, (3) that the harassment was based on sex, (4) that the harassment affected a term, condition or privilege of employment, and (5) that the employer knew or should have known about the harassment and failed to take prompt remedial action. Nash v. Electrospace System, Inc., 9 F.3d 401, 403 (5th Cir.1993). Sexually discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment violative of Title VII. Harris v. Forklift Systems, Inc., 510 U.S. 17, ---, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). In order to be actionable, however, the challenged conduct must create an environment that a

reasonable person would find hostile or abusive. Id. Whether an environment is hostile or abusive depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance. Id. at —, 114 S.Ct. at 371. We have previously noted that the " 'mere utterance of an epithet which engenders offensive feelings in an employee' " is insufficient, without more, to support Title VII liability. DeAngelis, 51 F.3d at 595 (quoting) Meritor Savings Bank v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986)).

Citation and Hollingshead argue that giving the Spirit of Jezebel excerpt to Weller was insufficient to support the jury's finding of hostile work environment. We agree. Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace. DeAngelis, 51 F.3d at 593. Viewing the evidence in the light most favorable to the verdict, the jury could have reasonably inferred that Hollingshead meant the article as retributive epithet--that Hollingshead remained angry at Weller and that he was calling her a "Jezebel." [FN5] We do not doubt that Weller was deeply offended by the article. However, we note that making actionable "conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality." Id. Instead, a lesser standard "would attempt to insulate women from everyday insults as if they remained models of Victorian reticence." Id. Such a result is not the goal

of Title VII. Id. We therefore hold that it was unreasonable, on the evidence presented, for the jury to find that Hollingshead's conduct created a hostile work environment. [FN6] Accordingly, we reverse the jury's verdict awarding Weller damages under a hostile work environment theory. [FN7]

III

The defendants next contest the jury's award for intentional infliction of emotional distress. Under Texas law, intentional infliction of emotional distress requires proof (1) that the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that the defendant's actions caused the plaintiff emotional distress, and (4) that the emotional distress suffered by the plaintiff was severe. Dean v. Ford Motor Credit Co., 885 F.2d 300, 306 (5th Cir.1989). Conduct is "outrageous," for purposes of an intentional infliction of emotional distress claim, "if it surpasses all bounds of decency, such that it is utterly intolerable in a civilized community." Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993) (internal quotation marks omitted). We have previously stated, in affirming summary judgment for a defendant on an intentional infliction of emotional distress claim, "Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." Id. at 243.

Citation and Hollingshead argue that the evidence was insufficient to support Weller's claim of intentional infliction of emotional distress. After carefully reviewing the evidence in the light most favorable to the

verdict, we conclude that Weller presented insufficient evidence to support the jury's verdict for intentional infliction of emotional distress. The Jezebel excerpt may have been hurtful and offensive, but intentional infliction of emotional distress requires evidence of conduct beyond mere insults, indignities, or petty oppressions. Id. Weller failed to present such evidence. Therefore, it was unreasonable for the jury to conclude that Hollingshead's conduct was sufficiently "outrageous" to support an intentional infliction of emotional distress claim. See Ugalde, 990 F.2d at 243 (holding employer's repeated references to an Hispanic employee as "wetback" insufficiently outrageous and extreme to support a claim for intentional infliction of emotional distress). Accordingly, we reverse the jury's verdict on Weller's claim of intentional infliction of emotional distress. [FN8]

IV

For the foregoing reasons, we REVERSE and RENDER judgment in favor of the defendants.

FN1. Weller testified that she was not offended by this book.

FN2. The article states, "When we speak of Jezebel, we are identifying the source in our society of obsessive sensuality, unbridled witchcraft and hatred of male authority."

FN3. The article states, "let us recognize that this demon can also operate through men. In fact, Jezebel seeks the highly refined qualities of the professional

musician...." The article continues that the spirit "flows unhindered throughout the entertainment industries. It flaunts itself in the world of fashion; it holds degrees in the philosophical departments of our schools and colleges."

FN4. 42 U.S.C. § 2000e-2.

FN5. It is undisputed that the Jezebel excerpt was an isolated incident in an otherwise satisfactory work relationship.

FN6. In DeAngelis, we noted the yet unresolved dilemma facing courts adjudicating claims at the intersection of Title VII and the First Amendment: Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech. DeAngelis, 51 F.3d at 598-99. Supreme Court precedent in this area provides little guidance concerning whether conduct targeted for its expressive content, like Hollingshead's conduct in this case, may be regulated under Title VII. See Wisconsin v. Mitchell, 508 U.S. 476, 485-87, 113 S.Ct. 2194, 2200, 124 L.Ed.2d 436 (1993) (holding that conduct not targeted on the basis of its expressive content may be regulated under Title VII). Because we find that the evidence was insufficient to support the jury's verdict, we leave this troubling question for another day.

FN7. Because Weller failed to present sufficient evidence to support her hostile work environment claim, her constructive discharge claim necessarily fails as well. See Landgraf v. USI Film Prods., 968 F.2d 427, 429 (5th Cir.1992), affirmed, ____ U.S. ____, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment."). We also need not address whether the jury properly held Hollingshead personally liable under Title VII. See Grant v. Lone Star Co., 21 F.3d 649, 650 (5th Cir.) (refusing to hold who does not qualify as an "employer" under Title VII, personal liable for creating hostile work environment), cert. denied, ____ U.S. ____, 115 S.Ct. 574, 130 L.Ed.2d 491 (1994). Nor need we address Citation's claim that the company took sufficient remedial steps to insulate itself from liability. See Carmon v. Lubrizol Corp., 17 F.3d 791, 795 (5th Cir.1994) (insulating an employer from Title VII liability where an employer takes an employee's allegations seriously, conducts a prompt and thorough investigation, and immediately implements remedial or disciplinary measures).

FN8. Having reversed the jury's verdict in total, we need not address defendants' other points of error.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT FILED
JUN O 3 1996

No.94-20439

D.C. Docket No. CA-H-92-3240

VIRGINIA WELLER,

Plaintiff-Appellee
Versus

CITATION OIL & GAS CORPORATION, and
RALPH HOLLINGSHEAD,

Defendants-Appellants.

Appeals from the United States District
Court for the Southern District of Texas

Before GARWOOD, EMILIO M. GARZA and
DeMOSS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment in this cause is reversed and judgment is rendered in favor of the defendants.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

CHARLES R. FULBRUGE
111
CLERK

JUN 25
1996

(2)

Supreme Court, U.S.
FILED
NOV 20 1996
CLERK

No. 96-428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VIRGINIA WELLER

Petitioner,

v.

CITATION OIL & GAS CORPORATION, et al.

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED FOR REVIEW

Whether offering a religious article to a female employee on a single occasion can constitute hostile environment sexual harassment in circumstances where the supervisor's conduct was otherwise unremarkable, the company took prompt action to insure that no similar incidents would occur in the future, and the female employee suffered no adverse job consequence as a result of the incident or her complaint concerning the incident.

LIST OF PARTIES TO THE PROCEEDINGS

A. Petitioner (Plaintiff-Appellee below) — *Virginia Weller,* domiciled in Houston, Harris County, Texas.

B. Respondent (Defendant-Appellant below) — *Citation Oil & Gas Corp.,* domiciled in Houston, Harris County, Texas, with projects in various states.

C. *Ralph Hollingshead* — A party to the proceeding below. Hollingshead, Plaintiff's former supervisor, was originally sued individually by Plaintiff for sexual harassment under Title VII and intentional infliction of emotional distress under Texas state law. The Fifth Circuit reversed and rendered in Hollingshead's favor on both issues. In her Petition for Certiorari, Plaintiff has not appealed the Fifth Circuit's decision on her state law claim for intentional infliction of emotional distress as to Hollingshead or any other party. Further, with regard to Title VII sexual harassment, Plaintiff has not appealed the Fifth Circuit's decision on the issue of Hollingshead's individual liability. Thus, Hollingshead's interests will not be directly affected by the Court's decision on Plaintiff's Petition for Certiorari.

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OPINION BELOW

Weller v. Citation Oil & Gas Corp., 84 F.3d 191 (5th Cir. 1996) (reprinted in Appendix A to this brief).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VIRGINIA WELLER,

Petitioner,

v.

CITATION OIL & GAS CORPORATION, et al.

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered judgment in favor of Respondent Citation Oil & Gas Corp. on June 3, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Virginia Weller ("Petitioner" or "Weller") sued Citation Oil & Gas Corp. ("Citation") and Ralph Hollingshead ("Hollingshead"), for hostile environment sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, and intentional infliction of emotional distress under state law. R. Tab 1. Accepting the jury's verdict, the district court entered judgment against Defendants on all claims. R. Tab 39, App. 4. On appeal, the Fifth Circuit reversed the verdict and rendered judgment for Defendants, concluding that the isolated incident alleged by Weller, did not, in the context of the surrounding circumstances, create a hostile work environment in violation of Title VII or constitute intentional infliction of emotional distress. *Weller* v. *Citation Oil & Gas Corp.*, 84 F.3d 191, 194-95 (5th Cir. 1996).[1]

Petitioner's statement of the case omits key facts relied on by the Fifth Circuit in its decision. Specifically, and as set forth in more detail below, Petitioner fails to include the following undisputed evidence:

(1) The Spirit of Jezebel article was an isolated incident in an otherwise satisfactory work relationship. 84 F.3d at 194 n.5; Tr-2 at 20-28, 75-87; Tr-3 at 23;

(2) Weller's supervisor, Ralph Hollingshead, was reprimanded almost immediately following her first (and only) report of the incident. 84 F.3d at 194; Tr-2 at 132-33; Tr-4 at 77-85; and

(3) Weller was assured that no further incidents would occur if she returned to work. 84 F.3d at 194; Tr-2 at 139.

These omissions are particularly misleading in light of this Court's requirement, as set forth in *Harris*[2] and upon which the Fifth Circuit reached its decision, that the determination whether an environment is hostile or abusive in violation of Title VII depends on the totality of the circumstances. 84 F.3d at 194.

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[1] The Fifth Circuit opinion is reprinted in Appendix "A" to this brief.

[2] *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 370, 126 L.Ed.2d 295 (1993).

As noted by the Fifth Circuit, Weller worked as a Contract Administrator in Citation's Contract and Marketing Department for almost two years. The department consisted of Weller, another female employee and their supervisor, Hollingshead. *Id.* at 193; Tr-2 at 77. Through Weller's work monitoring natural gas stored in the El Paso Natural Gas Pipeline, Weller discovered that Citation owned a quantity of gas which was not reflected in Citation's records.[3] Before completing a memorandum to Hollingshead regarding her discovery, Weller spoke with a friend, who was the Executive Vice President's secretary, and authorized her to tell the Executive Vice President about the gas. When the Executive Vice President telephoned Hollingshead to discuss the discovered gas, Hollingshead was "caught off guard" and was unprepared to explain the status of the gas. *Id.* Hollingshead's supervisors reprimanded him, and in turn, Hollingshead reprimanded Weller for ignoring proper channels. According to Weller, the reprimand was unnecessarily harsh. During the next four days, Weller testified that Hollingshead seemed angry and did not speak to her. *Id.*; Tr-2 at 20-27, 86-95; Tr-3 at 109-111.

Weller conceded at trial that it was wrong for her to ignore procedural channels by authorizing her friend to convey departmental information directly to Hollingshead's supervisor before informing Hollingshead. Tr-2 at 92-94. Weller further conceded that it was appropriate for Hollingshead to reprimand her. *Id.* Finally, Weller does not claim that Hollingshead ever mentioned her sex in connection with the reprimand or that he used any foul or inappropriate language in the reprimand *or at any other time* during her employment. *Id.*

Shortly thereafter, Hollingshead loaned Weller a religious children's book about angels. Weller testified that she was glad they were speaking again. Upon returning the book the next day, Weller told Hollingshead that the book presented a "unique thought" on the subject of angels. Weller testified at trial that she was not

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[3] Weller admitted at trial that she knew that others were aware of the gas prior to her "discovery" and that others had been tracking the gas for some time. Tr-2 at 87-90.

offended by this book. 84 F.3d at 193 n.1; Tr-2 at 26-27, 96-98; Tr-3 at 25. Hollingshead and Weller proceeded to have a short conversation about the death of John the Baptist, and how a woman, possessed with a spirit called "Jezebel," danced when John the Baptist was beheaded. Hollingshead then gave Weller some excerpted chapters from *The Three Battlegrounds,* a book by Francis Frangipane. According to Weller, she felt "anger" and "coldness" coming from Hollingshead when he handed her the article. As he handed her the material, Hollingshead stated "the Spirit of Jezebel is alive today." 84 F.3d at 193; Tr-2 at 27-28, 99-117.

The excerpted material Hollingshead gave Weller contained an intense religious diatribe concerning the "Spirit of Jezebel," a "controlling" and "manipulative" spirit bent on "corrupting" society and turning it away from a fundamentalist understanding of the teachings of Christ. According to the excerpt, the Spirit of Jezebel "is without gender," yet prefers to work through women because of the "uniqueness of the female psyche in its ability to manipulate without physical force." 84 F.3d at 193. The article states, "let us recognize that this demon can also operate through men. In fact, Jezebel seeks the highly refined qualities of the professional musician . . ." The article continues that the spirit "flows unhindered throughout the entertainment industries. It flaunts itself in the world of fashion; it holds degrees in the philosophical departments of our schools and colleges." *Id.* at 193 n.3. The excerpt encourages its readers to "do battle" against the Spirit of Jezebel in order to maintain a fundamentalist Christian order. *Id.* at 193; *see also* a complete copy of the article, attached to the brief submitted by Citation to the Fifth Circuit as Appendix A.

Weller testified that she was deeply offended by the excerpt's contents. *Id.;* Tr-2 at 40-41. Some of the sections of the article that she identified as most offensive, however, are direct quotes from the Bible. Tr-2 at 102, 109-16. She further testified that she believed that Hollingshead intended the material as a comment on her assertiveness at work. 84 F.3d at 193; Tr-2 at 40-41.

Three weeks later, after consulting an attorney, Weller concluded that she could no longer work with Hollingshead. *Id.* at 193-94; Tr-2 at 123-24. She complained to Bob Teague, Senior Vice President of Finance and Administration. It is undisputed that Citation's investigation was initiated within 24 hours of Weller's complaint to Teague. Tr-2 at 47. Moreover, Weller described Teague's reaction to her complaints as "kind" and "very supportive." Tr-3 at 35. Teague expressly told Weller that "I know it [offensive conduct] goes on in some companies, but it will not go on in this company. It will be taken seriously." Tr-2 at 46-47. Weller was contacted by the company president, Eddie Harrell, shortly after her discussion with Teague. Tr-2 at 129-30. As a result of their investigation, Citation officials reprimanded Hollingshead but were unable to transfer Weller because of the small size of her department, the specialized nature of her work, and the relatively small size of the company (only 175 employees). 84 F.3d at 194; Tr-2 at 130-36. Weller testified that she realized that there were no other similarly compensated positions for which she was qualified and that were open at that time. Tr-2 at 131-32. In addition, Weller conceded that she could not perform her job without supervision. *Id.* Following their investigation, Citation officials told Weller that they had spoken to Hollingshead and anticipated no further problems if she would return to work. 84 F.3d at 194; Tr-2 at 139.

It is undisputed that the Jezebel article excerpt was an isolated incident in an otherwise satisfactory work relationship. *Id.* at 194 n.5. Prior to the incident, Weller does not claim that sex was ever implicated in her working relationship with Hollingshead. Tr-2 at 20-28, Tr-3 at 23. To the contrary, Plaintiff testified at trial that she thought of her position as a "good job," and she "enjoyed the job." Tr-2 at 20, 78-79. The evidence at trial further showed that Weller received a good evaluation from Hollingshead, which praised her performance and formed the basis for a salary increase, increasing Weller's annual compensation $2,000 to $39,500. Tr-2 at 80-81. Furthermore, Weller admits that Hollingshead seemed pleased with her work. Tr-2 at 82. Finally, Plaintiff Weller was given progressively greater responsibility throughout her almost

two years of employment under Hollingshead's supervision. Tr-2 at 83.

Despite her own previous experience with Hollingshead and Citation's assurances, Weller refused to return to work. After several weeks of negotiations (during which Weller was not required to report to work but received full pay), she resigned. 84 F.3d at 194; Tr-2 at 128, 141-42. Weller then filed suit.

ARGUMENT

I. THE DECISION OF THE FIFTH CIRCUIT IS CONSISTENT WITH SUPREME COURT AUTHORITY REQUIRING EXAMINATION OF THE TOTALITY OF THE CIRCUMSTANCES

Actionable hostile environment sexual harassment requires proof that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently pervasive to alter the conditions of the victim's employment and create an abusive working environment . . .' " *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). Liability for a hostile environment does not extend to conduct that is merely offensive. 114 S. Ct. at 371. The " 'mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." *Id.* at 370 (citing *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986)).

In this case, the Fifth Circuit correctly determined that:

> In order to be actionable . . . the challenged conduct must create an environment that a reasonable person would find hostile or abusive. Whether an environment is hostile or abusive depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance . . . . [T]he 'mere utterance of an . . . epithet that engenders offensive feelings in an

> employee' is insufficient, without more, to support Title VII liability.

Weller, 84 F.3d at 194 (citing *Harris* and quoting *Meritor*) (citations omitted).

Applying the standard articulated in *Harris*, the Fifth Circuit correctly determined that, in Weller's case, the single incident of conduct alleged amounted to no more than "an offensive utterance." *Weller*, 84 F.3d at 194-95. While Petitioner now argues that the religious article somehow posed a threat to her physical safety, there is no record evidence in support of this subjective belief. Furthermore, the key facts that Petitioner chose to omit from her recitation of the facts provide ample support for the Fifth Circuit's conclusion that, taking into account "all of the circumstances," Weller was not subjected to a hostile or abusive work environment. As the Fifth Circuit emphasized, there was no evidence that the single religious article unreasonably interfered with Weller's performance. To the contrary, the undisputed evidence showed that:

1. The Jezebel article excerpt was an isolated incident in an otherwise satisfactory work relationship (Tr-2 at 20-28, 78-83; Tr-3 at 23);

2. Citation officials reprimanded Hollingshead for giving the religious article to Weller (Tr-2 at 130-36); and

3. Citation officials assured Weller that no further problems would occur if she returned to work (Tr-2 at 139).

Under this standard, expressly calling Weller a "Jezebel" on a single occasion is insufficient to support actionable hostile environment sexual harassment. Clearly then, implied name calling (as alleged by Weller) cannot constitute actionable sexual harassment.

Petitioner attempts to recast the Fifth Circuit's opinion by focusing on her subjective beliefs, ruminations, and conclusions regarding the single incident alleged. *See, e.g.*, Petition for Cert. at 9 ("She testified she *thought* Hollingshead had directed the article against her personally"), 10 ("Weller *believed* that Hollingshead intended the material as a comment on her assertiveness at work") (emphasis added). Such subjective criteria cannot and should not

displace the analysis mandated by this Court in *Harris*.[4] In *Harris*, this Court emphasized that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview." 114 S. Ct. at 370. The determination of whether an environment is objectively hostile or abusive requires examination of "all the circumstances," including the factors specifically enumerated in *Harris*: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*

Because Petitioner's evidence could not satisfy any of the other factors enumerated in *Harris*, it was appropriate for the Fifth Circuit to discuss whether the single incident alleged "unreasonably interfered with" Weller's performance. The Fifth Circuit's citation to its opinion in *DeAngelis* is particularly appropriate because of the similar nature of the conduct alleged in the two cases and the fact that such conduct occurred in the context of what was otherwise a work environment in which the plaintiff not only was not oppressed, but received raises, promotions, and increasing responsibility. *DeAngelis* v. *El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir.), *cert. denied* 116 S. Ct. 473 (1995).

In *DeAngelis*, the plaintiff complained about articles that appeared in a newsletter of the police officers' association. In the course of thirty months, ten articles were identified as offensive by plaintiff. Four of the articles specifically referred to the plaintiff and the remainder made comments that could be viewed as derogatory to female officers in general. *Id.* at 592-95. The Fifth Circuit concluded that the articles presented by plaintiff were "the equivalent of the 'mere utterance of an . . . epithet which engenders offensive feelings in an employee'" and therefore did not constitute

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[4] Respondent recognizes that *Harris* also requires that the plaintiff subjectively perceive the environment to be abusive. However, the strength of the plaintiff's subjective beliefs concerning the conduct alleged cannot be substituted for factual conduct required under the objective prong of *Harris*.

actionable sexual harassment. *Id.* at 595 (citing *Meritor,* 477 U.S. at 67).

Similarly, the conduct cited by Weller was nothing more than a single comment made in connection with the loan of a religious article. Plaintiff's subjective interpretation that Hollingshead's comment, "the spirit of Jezebel is alive today," implied that she was "a Jezebel" or was a call to violence is not supported by the evidence. Such an incident is neither severe enough nor pervasive enough to "alter the conditions of [Plaintiff's] employment and create an abusive working environment" as required by the Supreme Court nor has Weller presented proof that any other factor identified in *Harris* is applicable to her. *Harris,* 114 S. Ct. at 371. Further, like the plaintiff in *DeAngelis,* Weller has shown no evidence that the incident alleged "unreasonably interfered with her performance." For almost two years, Plaintiff thought of her position under Hollingshead's supervision as a "good job," and "enjoyed the job." Tr-2 at 20, 78-79. She received a good evaluation from Hollingshead, which praised her performance and formed the basis for a 5.3% salary increase. Tr-2 at 80-81. Hollingshead seemed pleased with her work and she was given progressively greater responsibility throughout her employment. Most importantly, Weller did not complain to Citation until approximately three weeks after receiving the article (and after she had contacted an attorney). Tr-2 at 123-24. It is undisputed that in the three weeks following the sole occasion of which Weller complains, she continued to work with Hollingshead without any problems or any further incident. Tr-2 at 124.

II. THE CIRCUIT COURTS, INCLUDING THE FIFTH CIRCUIT, UNIFORMLY APPLY THE SAME EVIDENTIARY SUFFICIENCY STANDARD TO HOSTILE WORK ENVIRONMENT CLAIMS.

Contrary to Petitioner's assertions, the Fifth Circuit does not employ a stricter standard than that in place in other Circuits, and the Fifth Circuit has never established a *per se* rule that one harassing incident is insufficient to succeed on a hostile work environment claim. *Weller,* 84 F.3d at 194 (citing *Harris* and quoting *Meritor*) (citations omitted). Like other Circuits, the Fifth

Circuit does recognize that Title VII is intended to remedy discrimination in the workplace, not the "mere utterance of an . . . epithet which engenders offensive feelings in an employee." *Meritor,* 477 U.S. at 67; *see also DeAngelis,* 51 F.3d at 595 (discussed above). The Supreme Court's requirement that the complained of conduct do more than occasionally offend an employee has properly lead the Fifth Circuit to reject claims concerning conduct that is trivial in nature and that does not have any significant impact on the ongoing working conditions of the employee.

In examining hostile work environment discrimination claims, other circuits have consistently adhered to the Fifth Circuit's view that conduct is actionable only when it adversely affects an employee's ability to perform their job. As stated by Judge Posner, "Title VII does not prohibit sexual harassment as such, but it does prohibit discrimination, on grounds of sex, in working conditions." *McDonnell* v. *Cisneros,* 84 F.3d 256, 259 (7th Cir. 1996) (citing with approval, *DeAngelis* v. *El Paso Municipal Police Officers Ass'n). See also, Hirase-Doi* v. *U.S. West Communications, Inc.,* 61 F.3d 777, 782 (10th Cir. 1995); *Spain* v. *Gallegos,* 26 F.3d 439, 446-47 (3d Cir. 1994); *Steiner* v. *Showboat Operating Co.,* 25 F.3d 1459, 1463 (9th Cir. 1994), *cert. denied* 115 S. Ct. 733 (1995). Accordingly, there is no conflict among the circuit courts concerning the proper standard for evaluating the evidentiary sufficiency of a hostile work environment claim.

Petitioner's argument to the contrary simply fails to address the factual disparities between this case and the cases she cites. Significantly, the cases that Petitioner suggests evidence a more lenient standard than that of the Fifth Circuit all involve circumstances far more egregious than are present in this case. For example, in *Carr* v. *Allison Gas Turbine Div., General Motors Corp.,* 32 F.3d 1007 (7th Cir. 1994)(Posner, J.), the Seventh Circuit reversed a judgment for the defendant finding that the plaintiff had been subjected to a hostile work environment. The plaintiff in *Carr* was subjected to an "egregious campaign of sexual harassment" lasting approximately five years. *Id.* at 1012. Carr, the sole female employed in the defendant's tinsmith shop, endured sexually derogatory comments on a daily basis during the five years she was in that position. *Id.* at 1009-10. For example, Carr was regularly referred to as "whore,"

"cunt," and "split-tail." *Id.* at 1009. In addition to such verbal attacks, Carr's coworkers painted "cunt" on her toolbox, cut the seat out of the overalls she wore at work, stripped to their underwear in front of her, exposed themselves to her, and placed graphic and offensive signs, pictures, and graffiti in her work area. *Id.* Not surprisingly, the Seventh Circuit found that such conduct was severe and pervasive enough to have adversely affected the conditions of Carr's employment.

In contrast with the result reached in the *Carr* case, the Seventh Circuit had little difficulty reversing a jury award for the plaintiff in a hostile work environment claim when faced with facts significantly less abusive and hostile than addressed in *Carr* but significantly more problematic than those in this case. In *Baskerville* v. *Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (Posner, J.), the plaintiff complained of harassing conduct by her supervisor occurring over a seven month time frame. Such incidents included the supervisor referring to her as "pretty girl," making a grunting sound when she wore a leather skirt, and making a hand gesture suggestive of masturbation. *Id.* Although the plaintiff was able to cite nine instances in which her supervisor made comments with sexual overtones, the court nonetheless found that the supervisor's conduct did not amount to sexual harassment. The court noted, "He never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him, or to go out on a date with him. He made no threats. He did not expose himself, or show her dirty pictures. He never said anything to her that could not be repeated on prime time television." *Id.* at 431. In comparison to the conduct rejected by the Seventh Circuit in *Baskerville*, the conduct of which Weller complains was even less egregious. The single incident cited by Weller was not ongoing, not sexually explicit, not highly derogatory, and did not occur in public. Tr-2 at 20-28, Tr-3 at 23.

The other cases relied on by Weller are similarly inapposite. In *Steiner* v. *Showboat Operating Co.*, the plaintiff was subjected to ongoing harassment that included being called "dumb fucking broad," "cunt," and "fucking cunt" by her supervisor. 25 F.3d at 1461 (9th Cir. 1994). Moreover, the plaintiff was physically threatened and publicly humiliated during one particularly egregious incident. In finding that this conduct was actionable

under Title VII, the Ninth Circuit noted that the complained of conduct was ongoing, sexually explicit, highly derogatory, and publicly made. *Id.* at 1463. The same cannot be said of this case. Weller identified only one incident in the course of almost two years of uneventful (and successful) employment — a fundamentalist religious article. There was no ongoing harassment, there were no graphic sexual remarks, and she was never touched or physically threatened. She was never publicly humiliated in any way. Tr-2 at 20-28, Tr-3 at 23.

Weller's results-oriented approach to legal analysis fails to understand that merely because cases have differing outcomes does not inexorably lead to the conclusion that differing legal standards were used. The cases cited by Weller do not involve the application of a legal standard lower than the Fifth Circuit's; they merely involve facts which are readily distinguishable from those presented by Weller due to the pervasiveness and severity of the conduct at issue.

Importantly, Petitioner fails to cite a single case in which a plaintiff has succeeded on a hostile work environment claim based on facts similar to those at issue in this case. When faced with factual scenarios more analogous to that presented in this case, the Circuits consistently find that the plaintiff failed to prove the existence of a hostile work environment. *See e.g., Hopkins* v. *Baltimore Gas and Elec. Co.,* 77 F.3d 745, 747-78, 753 (4th Cir. 1996) (male supervisor's treatment of male employee that included bumping into employee, positioning a magnifying glass over his crotch, giving employee a congratulatory kiss at employee's wedding, and several other inappropriate sexual comments did not constitute a hostile work environment; also finding that same-sex sexual harassment is not cognizable under Title VII); *Callanan* v. *Runyan,* 75 F.3d 1293, 1295-96 (8th Cir. 1996) (employee who received less favorable work assignments and training opportunities than male employees and who had periodic negative encounters with supervisors including being called a "bitch" did not establish the existence of a hostile work environment); *Bolden* v. *PRC,* 43 F.3d 545, 552 (10th Cir. 1994) (plaintiff asserting hostile work environment claim on the basis of racial harassment failed to carry burden despite being regularly referred to as "nigger" by co-

workers, being told, "you better be careful because we know people in the Ku Klux Klan" and being called numerous other vulgar names over an eight year period); *Candelore* v. *Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) (workplace conduct including isolated incidents of sexual horseplay did not constitute a hostile work environment).

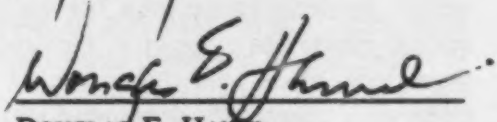
Moreover, Petitioner fails to cite a single case in which an isolated incident established a hostile work environment. Rather, in every case cited by Petitioner in which a plaintiff carried her burden of proof, the offending conduct was repetitive in nature. In addition to the continuous nature of the harassment, successful plaintiffs were typically subjected to conduct that was either physically assaultive, physically menacing, or sexually explicit. *E.g.*, *Hirase-Doi*, 61 F.3d at 781 (plaintiff was subjected to ongoing harassment including written and verbal sexually offensive remarks, attempts to touch her breasts, and being grabbed between the legs); *Beardsley* v. *Webb*, 30 F.3d 524, 528 (4th Cir. 1994) (plaintiff was continually harassed for approximately six months including touching, false accusations that she was having an extramarital affair, explicitly sexual remarks concerning her underwear and birth control, and sexual innuendos); *Spain* v. *Gallegos*, 26 F.3d 439, 442 (harassment took place over the course of several years during which a supervisor repeatedly demanded loans of money from subordinate and refused to end rumors that the two were having an affair); *King* v. *Hillen*, 21 F.3d 1572, 1573-74, 1581-82 (Fed. Cir. 1994) (harassing conduct was directed at numerous female co-workers and included touching, suggestive looks and comments, offensive jokes and propositions). That is not to say that a single incident could never suffice as sexual harassment but only that the severity of the conduct must rise to a higher level than a single religious article in order to implicate Title VII. *See Steiner*, 25 F.3d at 1463 n.4 ("the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct") (citation omitted).

CONCLUSION

It is clear that Title VII provides a remedy for individuals who are subjected to a hostile or abusive working environment. It is equally clear, however, that the Fifth Circuit correctly determined that Petitioner had failed to show that the isolated incident where her supervisor gave her a religious article converted an otherwise unobjectionable working environment into one that was violative of Title VII. This case does not merit consideration by this Court because the facts alleged by Petitioner are not typical of the facts commonly alleged in hostile work environment cases. Furthermore, the Fifth Circuit's resolution of this case, with its unique and limited facts, is unlikely to have any significant impact on future decisions in other cases.

Based upon all of the foregoing, Respondent Citation Oil & Gas respectfully requests that the Petition for Writ of Certiorari be denied in all respects.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this the 20th day of November, 1996, a correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been forwarded to counsel for Petitioner by placing same in the United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

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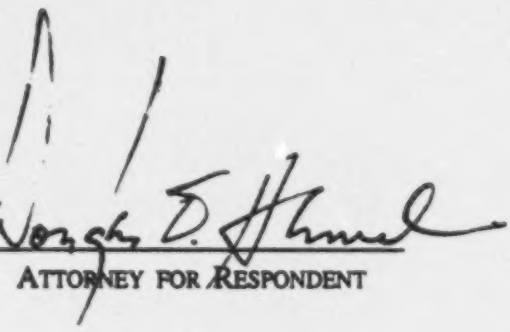

ATTORNEY FOR RESPONDENT

APPENDIX A

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 94-2-439

VIRGINIA WELLER,

Plaintiff-Appellee,

v.

CITATION OIL & GAS CORPORATION,

and

RALPH HOLLINGSHEAD,

Defendants-Appellants.

June 3, 1996

Employee brought action against her former employer for intentional infliction of emotional distress and hostile work environment under Title VII. The United States District Court for the Southern District of Texas, David Hittner, J., entered judgment in favor of employee, and employer appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held: (1) fact that supervisor, who was reprimanded as result of employee's conduct, gave employees article containing religious diatribe concerning the "Spirit of Jezebel" did not create hostile work environment under Title VII, and (2) supervisor's conduct in giving the article to employee who was not sufficiently outrageous to support intentional infliction of emotional distress claim under Texas law.

Reversed and rendered.

1. **Federal Courts k799**

In reviewing case for sufficiency of the evidence, Court of Appeals considers all the evidence presented, not just evidence supporting the verdict, but in light most favorable to, and drawing all reasonable inferences in favor of, the party who obtained the verdict.

2. **Federal Courts k847**

When reviewing case for sufficiency of the evidence, Court of Appeals will reverse only if reasonable minds exercising impartial judgment could not have arrived at the verdict.

3. **Civil Rights k167**

To state claim for relief under Title VII for gender discrimination based on theory of hostile work environment, plaintiff must prove that she belongs to protected class, that she was subject to unwelcome harassment, that the harassment was based on sex, that harassment affected term, condition, or privilege of employment, and that employer knew or should have known about harassment and failed to take prompt remedial action. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e-2.

4. **Civil Rights k167**

Sexually discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive to alter conditions of plaintiff's employment and create abusive working environment violative of Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. **Civil Rights k145**

To be actionable under Title VII, the challenged conduct must create an environment that a reasonable person would find hostile or abusive. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. **Civil Rights k145**

Whether work environment is hostile or abuse so as to violate Title VII depends on totality of the circumstances, focusing on factors such as frequency of the conduct, severity of conduct, degree to which conduct is physically threatening or humiliating, and degree to which conduct unreasonably interferes with employee's work performance. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. **Civil Rights k141**

Title VII is only meant to bar conduct that is so severe and pervasive that it destroys protected class member's opportunity to succeed in the workplace. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. **Civil Rights k167**

Fact that supervisor, who had been reprimanded as result of employee's conduct, gave employee article containing religious diatribe concerning the "Spirit of Jezebel" did not create hostile work environment in violation of Title VII, despite fact that jury could have reasonably inferred that supervisor meant the article as a retributive epithet, that supervisor was calling employee a "Jezebel" and that employee was offended by the article. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. **Civil Rights k145**

Because employee failed to present sufficient evidence to support her Title VII hostile work environment claim, her constructive discharge claim necessarily failed as well. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. **Damages k50.10**

Under Texas law, intentional infliction of emotional distress requires proof that defendant acted intentionally or recklessly, that defendant's conduct was extreme and outrageous, that defendant's actions caused plaintiff emotional distress, and that the emotional distress suffered by plaintiff was severe.

11. **Damages k50.10**

Under Texas law, conduct is "outrageous," for purposes of intentional infliction of emotional distress claim, if it surpasses all bounds of decency, such that it is utterly intolerable in a civilized community.

See publication Words and Phrases for other judicial constructions and definitions.

12. **Damages k50.10**

Under Texas law, intentional infliction of emotional distress requires evidence of conduct beyond mere insults, indignities, or petty oppressions.

13. **Damages k50.10**

Under Texas law, conduct of supervisor, who was reprimanded as result of employee's actions, in giving employee article containing religious diatribe concerning the "Spirit of Jezebel" was not sufficiently outrageous to support intentional infliction of emotional distress claim.

Appeals from the United States District Court for the Southern District of Texas.

Before GARWOOD, EMILIO M. GARZA AND DEMOSS, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Defendants Citation Oil & Gas Corporation ("Citation") and Ralph Hollingshead appeal a jury verdict awarding plaintiff Virginia Weller damages on her employment discrimination claims. We reverse.

I

Weller worked as a Contract Administrator in Citation's Contract and Marketing Department. The department consisted of Weller, her supervisor Ralph Hollingshead, and one other female employee. Through Weller's work monitoring natural gas stored in the El Paso Natural Gas Pipeline, Weller discovered that Citation owned a quantity of gas which was not reflected in Citation's records. Before completing a memorandum to Hollingshead detailing her discovery, Weller informed the Executive Vice President's secretary about the gas. When the Executive Vice President phoned Hollingshead to discuss the discovered gas, Hollingshead was "caught off guard" and was unprepared to explain the status of the gas. Hollingshead's supervisors reprimanded him, and in turn, Hollingshead reprimanded Weller for ignoring proper channels.

According to Weller, the reprimand was unnecessarily harsh. During the next four days, Weller testified that Hollingshead seemed angry and did not speak to her.

Shortly thereafter, Hollingshead loaned Weller a religious children's book about angels. Weller testified that she was glad they were speaking again. Upon returning the book the next day, Weller told Hollingshead that the book presented a "unique thought" on the subject of angels.[1] Hollingshead and Weller proceeded to have a short conversation about the death of John the Baptist, and how a woman, possessed with a spirit called "Jezebel," danced when John the Baptist was beheaded. Hollingshead then gave Weller some excerpted chapters from *The Three Battlegrounds*, a book by Francis Frangipane. According to Weller, she felt "anger" and "coldness" coming from Hollingshead when he handed her the article. As he handed her the material, Hollingshead stated "the Spirit of Jezebel is alive today."

The excerpted material Hollingshead gave Weller contained an intense religious diatribe concerning the "Spirit of Jezebel," a "controlling" and "manipulative" spirit bent on "corrupting" society and turning it away from a fundamentalist understanding of the teachings of Christ.[2] According to the excerpt, the Spirit of Jezebel "is without gender," yet prefers to work through women because of the "uniqueness of the female psyche in its ability to manipulate without physical force."[3] The excerpt encourages its readers to "do battle" against the Spirit of Jezebel in order to maintain a fundamentalist Christian order.

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[1] Weller testified that she was not offended by this book.

[2] The article states, "When we speak of Jezebel, we are identifying the source in our society of obsessive sensuality, unbridled witchcraft and hatred of male authority."

[3] The article states, "let us recognize that this demon can also operate through men. In fact, Jezebel seeks the highly refined qualities of the professional musician . . . ." The article continues that the spirit "flows unhindered throughout the entertainment industries. It flaunts itself in the world of fashion; it holds degrees in the philosophical departments of our schools and colleges."

Weller was deeply offended by the excerpt's contents. She believed that Hollingshead intended the material as a comment on her assertiveness at work. Three weeks later, after consulting an attorney, Weller concluded that she could no longer work with Hollingshead. She complained to Citation officials and requested a transfer. Citation officials made an inquiry into the incident and reprimanded Hollingshead but were unable to transfer Weller. Citation officials told Weller that they had spoken to Hollingshead and anticipated no further problems if she would return to work. After several weeks of negotiations, she resigned. Weller filed suit against Citation and Hollingshead, asserting claims for sexual harassment, constructive discharge, and intentional infliction of emotional distress. A jury found in her favor and awarded damages on all claims. Defendants now appeal the jury verdict.

II

[1,2] The defendants argue that Weller presented insufficient evidence to support the jury's verdict. In reviewing a case for sufficiency of the evidence, we consider all the evidence presented, not just the evidence supporting the verdict, but in the light most favorable to, and drawing all reasonable inferences in favor of, the party who obtained the verdict. *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (*en banc*). We will reverse only if reasonable minds exercising impartial judgment could not have arrived at the verdict. *DeAngelis* v. *El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir.), *cert. denied*, ____ U.S. ____, 116 S. Ct. 473, 133 L.Ed. 2d 403 (1995).

[3-6] To state a claim for relief under Title VII[4] for gender discrimination based on a theory of a hostile work environment, a plaintiff must prove (1) that she belongs to a protected class, (2) that she was subject to unwelcome harassment, (3) that the harassment was based on sex, (4) that the harassment affected a term, condition or privilege of employment, and (5) that the employer knew or should have known about the harassment and failed to take prompt remedial action. *Nash* v. *Electrospace System, Inc.*, 9 F.3d

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[4] 42 U.S.C. § 2000e-2.

401, 403 (5th Cir. 1993). Sexually discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment violative of Title VII. *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, ____, 114 S. Ct. 367, 370, 126 L. Ed.2d 295 (1993). In order to be actionable, however, the challenged conduct must create an environment that a reasonable person would find hostile or abusive. *Id.* Whether an environment is hostile or abusive depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which to which the conduct unreasonably interferes with an employee's work performance. *Id.* at ____, 114 S. Ct. at 371. We have previously noted that the " 'mere utterance of . . . epithet which engenders offensive feelings in an employee' " is insufficient without more, to support Title VII liability. *De Angelis*, 51 F.3d at 595 (quoting *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405, 91 L.Ed.2d 49 (1986)).

[7-9] Citation and Hollingshead argue that giving the Spirit of Jezebel excerpt to Weller was insufficient to support the jury's finding of hostile work environment. We agree. Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace. *DeAngelis*, 51 F.3d at 593. Viewing the evidence in the light most favorable to the verdict, the jury could have reasonably inferred that Hollingshead meant the article as retributive epithet — that Hollingshead remained angry at Weller and that he was calling her a "Jezebel."[5] We do not doubt that Weller was deeply offended by the article. However, we note that making actionable "conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality." *Id.* Instead, a lesser standard "would attempt to insulate women from everyday insults as if they remained models of Victorian

[5] It is undisputed that the Jezebel excerpt was an isolated incident in an otherwise satisfactory work relationship.

reticence." *Id.* Such a result is not the goal of Title VII. *Id.* We therefore hold that it was unreasonable, on the evidence presented, for the jury to find that Hollingshead's conduct created a hostile work environment.[6] Accordingly, we reverse the jury's verdict awarding Weller damages under a hostile work environment theory.[7]

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[6] In *DeAngelis*, we noted the yet unresolved dilemma facing courts adjudicating claims at the intersection of Title VII and the First Amendment:

> Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.

De Angelis, 51 F.3d at 598-99. Supreme Court precedent in this area provides little guidance concerning whether conduct targeted for its expressive content like Hollingshead's conduct in this case, may be regulated under Title VII. *See Wisconsin* v. *Mitchell*, 508 U.S. 476, 485-87, 113 S. Ct. 2194, 2200, 124 L.Ed.2d 436 (1993) (holding that conduct *not* targeted on the basis of its expressive content may be regulated under Title VII). Because we find that the evidence was insufficient to support the jury's verdict, we leave this troubling question for another day.

[7] Because Weller failed to present sufficient evidence to support her hostile work environment claim, her constructive discharge claim necessarily fails as well. *See Landgraf* v. *USI Film Prods.*, 968 F.2d 427, 429 (5th Cir. 1992), *affirmed*, ____ U.S. ____, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment."). We also need not address whether the jury properly held Hollingshead personally liable under Title VII. *See Grant* v. *Lone Star Co.*, 21 F.3d 649, 650 (5th Cir.) (refusing to hold individual, who does not qualify as an "employer" under Title VII, personally liable for creating hostile work environment), *cert. denied*, ____ U.S. ____, 115 S. Ct. 574, 130 L. Ed.2d 491 (1994). Nor need we address Citation's claim that the company took sufficient remedial steps to insulate itself from liability. *See Carmon* v. *Lubrizol Corp.*, 17 F.3d 791, 795 (5th Cir. 1994) (insulating an employer from Title VII liability where an employer takes an employee's allegations seriously, conducts a prompt and thorough investigation, and immediately implements remedial or disciplinary measures).

III

[10,11] The defendants next contest the jury's award for intentional infliction of emotional distress. Under Texas law, intentional infliction of emotional distress requires proof (1) that the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that the defendant's actions caused the plaintiff emotional distress, and (4) that the emotional distress suffered by the plaintiff was severe. *Dean* v. *Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989). Conduct is "outrageous," for purposes of an intentional infliction of emotional distress claim, "if it surpasses all bounds of decency, such that it is utterly intolerable in a civilized community." *Ugalde* v. *W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993) (internal quotations marks omitted). We have previously stated, in affirming summary judgment for a defendant on an intentional infliction of emotional distress claim, "Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." *Id.* at 243.

[12,13] Citation and Hollingshead argue that the evidence was insufficient to support Weller's claim of intentional infliction of emotional distress. After carefully reviewing the evidence in the light most favorable to the verdict, we conclude that Weller presented insufficient evidence to support the jury's verdict for intentional infliction of emotional distress. The Jezebel excerpt may have been hurtful and offensive, but intentional infliction of emotional distress requires evidence of conduct beyond mere insults, indignities, or pretty oppressions. *Id.* Weller failed to present such evidence. Therefore, it was unreasonable for the jury to conclude that Hollingshead's conduct was sufficiently "outrageous" to support an intentional infliction of emotional distress claim. See *Ugalde*, 990 F.2d at 243 (holding employer's repeated references to an Hispanic employee as "wetback" insufficiently outrageous and extreme to support a claim for intentional infliction of emotional distress). Accordingly, we reverse the jury's verdict on Weller's claim of intentional infliction of emotional distress.[8]

IV

For the foregoing reasons, we REVERSE and RENDER judgment in favor of the defendants.

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[8] Having reversed the jury's verdict in total, we need not address defendants' other points of error.